

(2)
FEB 15 1991

NO. 90-728

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RICHARD R. SYRE,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

ANN C. LEBOWITZ
Assistant District Attorney
(Counsel of Record)
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Assistant District
Attorney
RONALD D. CASTILLE
District Attorney

1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700



QUESTIONS PRESENTED

1. Where petitioner was convicted by a jury of tampering with a witness, and where petitioner's conviction was twice upheld by Pennsylvania's highest court on respondent's successful appeals from erroneous decisions of the intermediate appellate court, does the double jeopardy clause preclude the imposition of sentence following the decision of the state trial judge that petitioner had violated his probationary sentence?

2. Do this Court's decisions in Smalis v. Pennsylvania, 476 U.S. 140 (1986), and Burks v. United States, 437 U.S. 1 (1977), prevent a state prosecutor from appealing to the state's highest court where an intermediate appellate court has entered an erroneous and insupportable ruling purporting to discharge petitioner from his jury tampering conviction despite



legally sufficient evidence to support the guilty verdict below?

3. Does Pennsylvania's statutory scheme for successive appeals through a hierarchy of appellate courts violate constitutional principles of double jeopardy as applied to the states where the prosecutor appeals legal error in a criminal case?

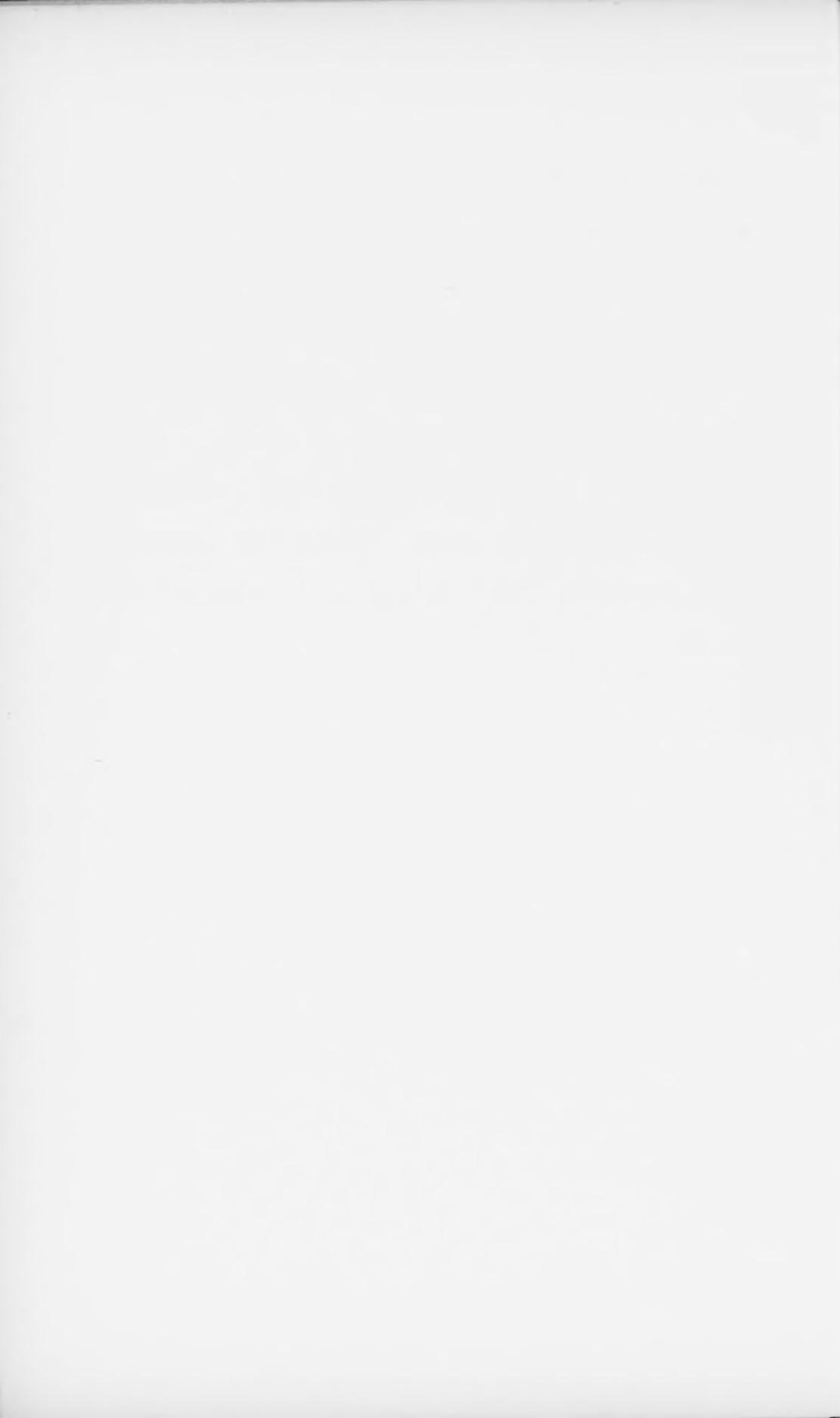


TABLE OF CONTENTS

	<u>PAGE</u>
Questions Presented	i-ii
Table of Authorities	iv-viii
Orders and Opinions Below	1-3
Jurisdiction	3
Constitutional Provisions Involved	3-4
Counter-Statement of the Case	4-13
Reasons for Denying the Writ	
Consistent with the double jeopardy clause, a state prosecutor has the right to file an appeal and obtain a final appellate dis- position in a criminal case.	13-23
Conclusion	24



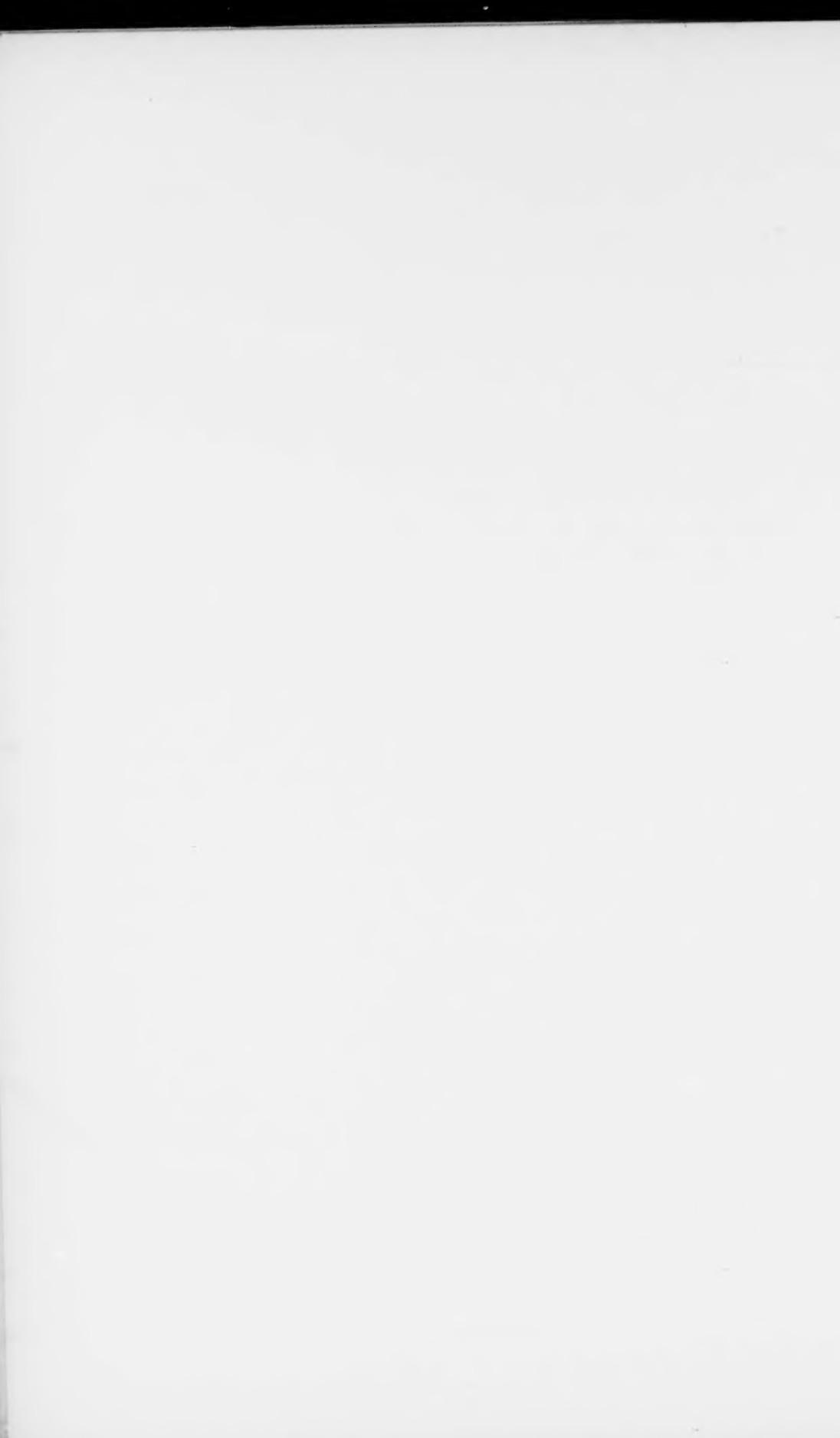
TABLE OF AUTHORITIES

	<u>PAGE</u>
Federal Cases	
Arizona v. Manypenny, 451 U.S. 232, 101 S. Ct. 1657 (1981)	12
Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978)	13, 14
Forman v. United States, 361 U.S. 416, 80 S. Ct. 481 (1960)	19
Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 (1942)	7, 22
Green v. United States, 355 U.S. 184, 78 S. Ct. 221 (1957)	4
Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970 (1981)	15
Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979)	23
Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S. Ct. 1805 (1984)	15
Price v. Georgia, 398 U.S. 323, 90 S. Ct. 1757 (1970)	20
Richardson v. United States, 468 U.S. 317, 104 S. Ct. 3081 (1984)	14-15



PAGE

Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745 (1986)	13, 16
Syre v. Pennsylvania, 662 F. Supp. 550 (E.D. Pa. 1987), <u>affirmed</u> , 845 F.2d 1015 (3rd Cir.), <u>cert. denied</u> , 488 U.S. 853, 109 S. Ct. 139 (1988)	8
United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192 (1896)	20
United States v. Blasco, 581 F.2d 681 (7th Cir.), <u>cert.</u> <u>denied</u> , 439 U.S. 966 (1978)	15
United States v. Calloway, 562 F.2d 615 (10th Cir. 1977)	15
United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054 (1978)	16
United States v. Covino, 837 F.2d 65 (2nd Cir. 1988)	14
United States v. Dixon, 658 F.2d 181 (3rd Cir. 1981)	21
United States v. Greer, 850 F.2d 1447 (11th Cir. 1988)	14, 21
United States v. Hemphill, 544 F.2d 341 (8th Cir. 1976), <u>cert. denied</u> , 430 U.S. 967 (1977)	15



PAGE

United States v. Jones, 580 F.2d 219 (6th Cir. 1978)	15
United States v. Kellerman, 729 F.2d 281 (4th Cir. 1984)	15
United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S. Ct. 1349 (1977)	16,21
United States v. Morrison, 429 U.S. 1, 97 S. Ct. 24 (1976)	16
United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187 (1978)	17
United States v. Sharif, 817 F.2d 1375 (9th Cir. 1987)	14
United States v. Singleton, 702 F.2d 1159 (D.C. Cir. 1983)	15
United States v. Steed, 674 F.2d 284 (4th Cir.), <u>cert.</u> <u>denied</u> , 459 U.S. 829 (1982)	20
United States v. Tateo, 377 U.S. 463, 84 S. Ct. 1587 (1964)	20
United States v. Wilson, 420 U.S. 332, 95 S. Ct. 1013 (1975)	11-12, 16,17, 18,19, 21



	<u>PAGE</u>
<u>State Cases</u>	
Commonwealth v. Blevins, 453 Pa. 481 (1973)	12
Commonwealth v. Coccioletti, 493 Pa. 103 (1981)	7
Commonwealth v. Council, 491 Pa. 434 (1980)	7
Commonwealth v. Rawles, 501 Pa. 514 (1983)	12
Commonwealth v. Syre, 322 Pa. Super. 416 (1983)	2, 6
Commonwealth v. Syre, 348 Pa. Super. 110 (1985)	3, 8
Commonwealth v. Syre, 507 Pa. 299 (1985)	2, 8
Commonwealth v. Syre, 513 Pa. 1 (1986), <u>cert. denied</u> , 480 U.S. 935, 107 S. Ct. 1577 (1987)	3, 8
State ex rel. Syre v. Willi- quette, Sheriff of Vilas County, 441 N.W.2d 756 (Wisconsin Ct. of Appeals), <u>review denied</u> , 443 N.W.2d 312 (Wisconsin Supreme Ct.), <u>cert. denied</u> , 110 S. Ct. 157 (1989)	10
<u>Federal Constitution and Statutes</u>	
U.S. Const., Amend. V	3

	<u>PAGE</u>
U.S. Const., Amend. XIV	3-4
28 U.S.C. §1257(a)	3
42 U.S.C. §1983	8

Pennsylvania Statutes

18 Pa. Cons. Stat. Ann. §4907, repealed Dec. 4, 1980, P.L. 1097, No. 187 §2	4
42 Pa. Cons. Stat. Ann. §722	6
42 Pa. Cons. Stat. Ann. §724	7,12
42 Pa. Cons. Stat. Ann. §742	6
42 Pa. Cons. Stat. Ann. §5105(b)	12

NO. 90-728

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

RICHARD R. SYRE,
Petitioner
v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

ORDERS AND OPINIONS BELOW

The unreported memorandum opinion of the Pennsylvania Superior Court, which affirmed the new probationary sentence imposed on petitioner following his extradition from Wisconsin and the revocation of his original period of probation by the Pennsylvania trial judge, is set forth in petitioner's appendix at A-1 to A-4. The

Pennsylvania Supreme Court denied discretionary review of the Superior Court's affirmance of these probation proceedings by order entered September 6, 1990.

Earlier opinions of the Pennsylvania Superior Court and the Pennsylvania Supreme Court on direct appeal are reported as follows: Petitioner's initial appeal to the Pennsylvania Superior Court, which granted a discharge on sufficiency grounds, is reported at Commonwealth v. Syre, 322 Pa. Super. 416 (1983). The decision of the Pennsylvania Supreme Court, reversing the Superior Court's discharge for insufficient evidence, reinstating petitioner's judgment of sentence and remanding to the Superior Court for consideration of petitioner's remaining appellate claims, is reported at Commonwealth v. Syre, 507 Pa. 299 (1985). On remand, the Superior Court granted petitioner a new trial for supposed error based on the comment of a court officer. That

Superior Court decision is reported at Commonwealth v. Syre, 348 Pa. Super. 110 (1985). The subsequent decision of the Pennsylvania Supreme Court, again reversing the Superior Court's grant of relief, is reported at Commonwealth v. Syre, 513 Pa. 1 (1986), cert. denied, 480 U.S. 935, 107 S. Ct. 1577 (1987).

JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five, which provides:

nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb

United States Constitution, Amendment Fourteen, which provides:

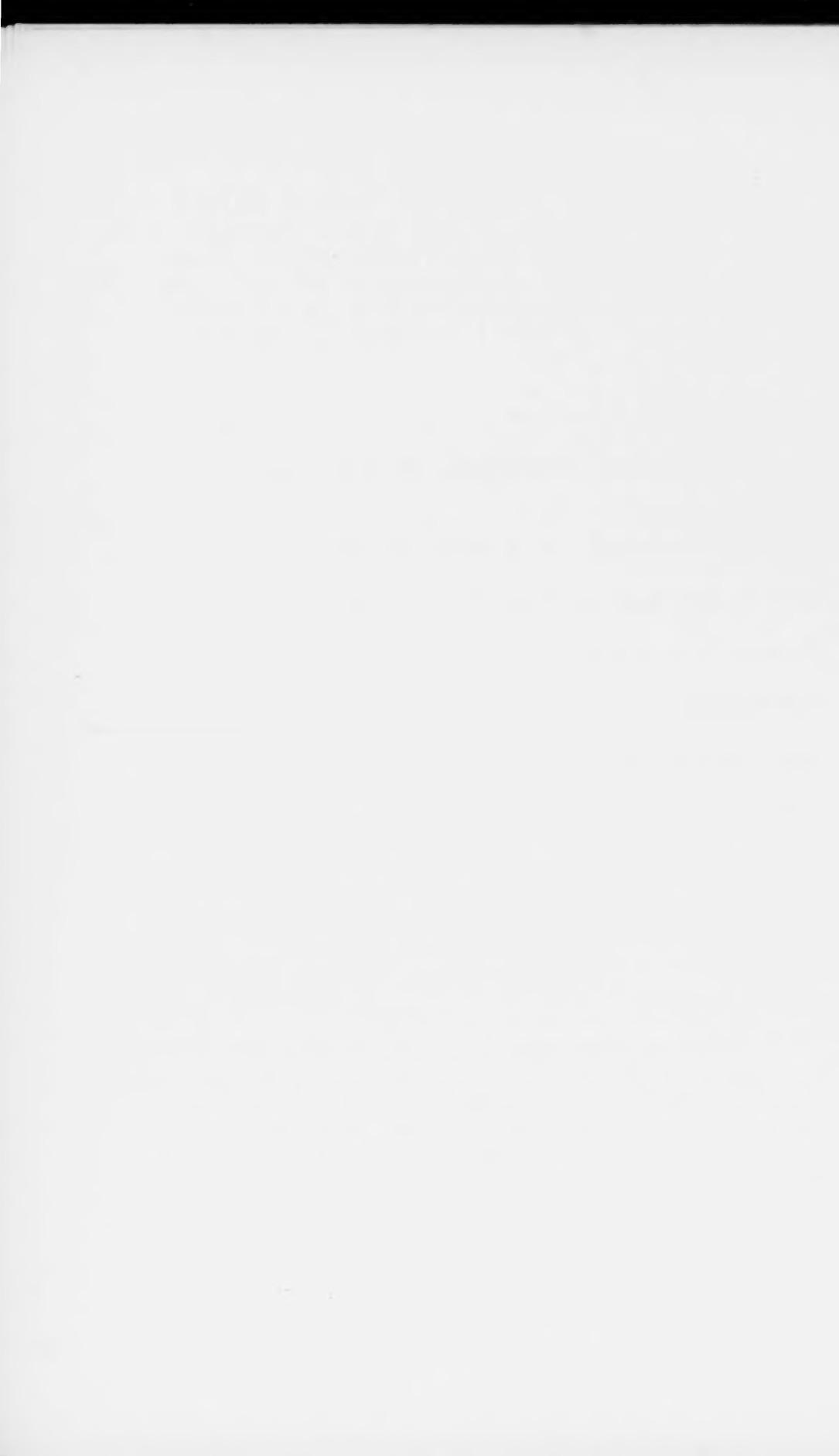
No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTER-STATEMENT OF THE CASE

Petitioner, a former Teamsters lawyer, now disbarred by the Pennsylvania Supreme Court, was convicted by a jury of witness tampering in violation of Pennsylvania law, see former 18 Pa. Cons. Stat. Ann. §4907. This is petitioner's fourth attempt to gain certiorari review in this Court. His present petition, like the three which preceded it, should be denied.¹

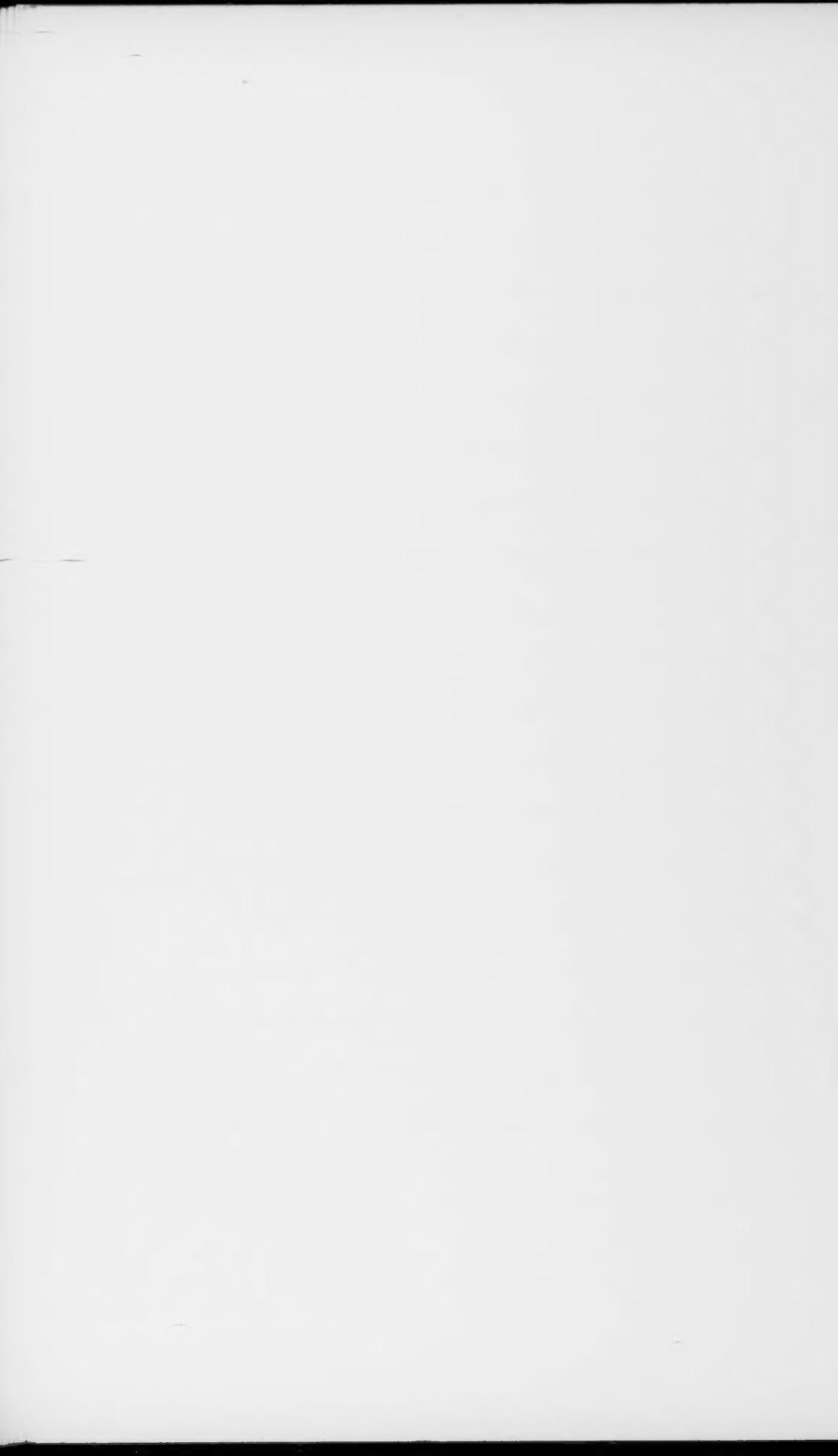
¹Petitioner was initially charged with two counts of witness tampering. As to one count, the jury returned a verdict of not guilty. This not guilty verdict was, of course, final as to that count and was not at issue further. See Green v. United States, 355 U.S. 184, 78 S. Ct. 221 (1957). Petitioner, however, was convicted by the jury of a second count of witness tampering. It is that conviction which was before the Pennsylvania Supreme Court and
(continued...)



Petitioner was adjudged guilty following a 1981 jury trial at which the credited evidence established that he bribed the complainant in a criminal prosecution of petitioner's Teamster clients. According to tape-recorded evidence introduced at trial, petitioner paid the witness to withdraw criminal charges. Petitioner also counselled the witness on how to avoid a subpoena and how to alter his testimony to preclude perjury charges. The jury disbelieved petitioner's explanation that the taped conversations comprised "emergency legal aid" and that petitioner's payments to the witness were in settlement of a civil, not a criminal, action. Petitioner's post-verdict motions were denied and the trial judge imposed a two-year probationary sentence conditioned on

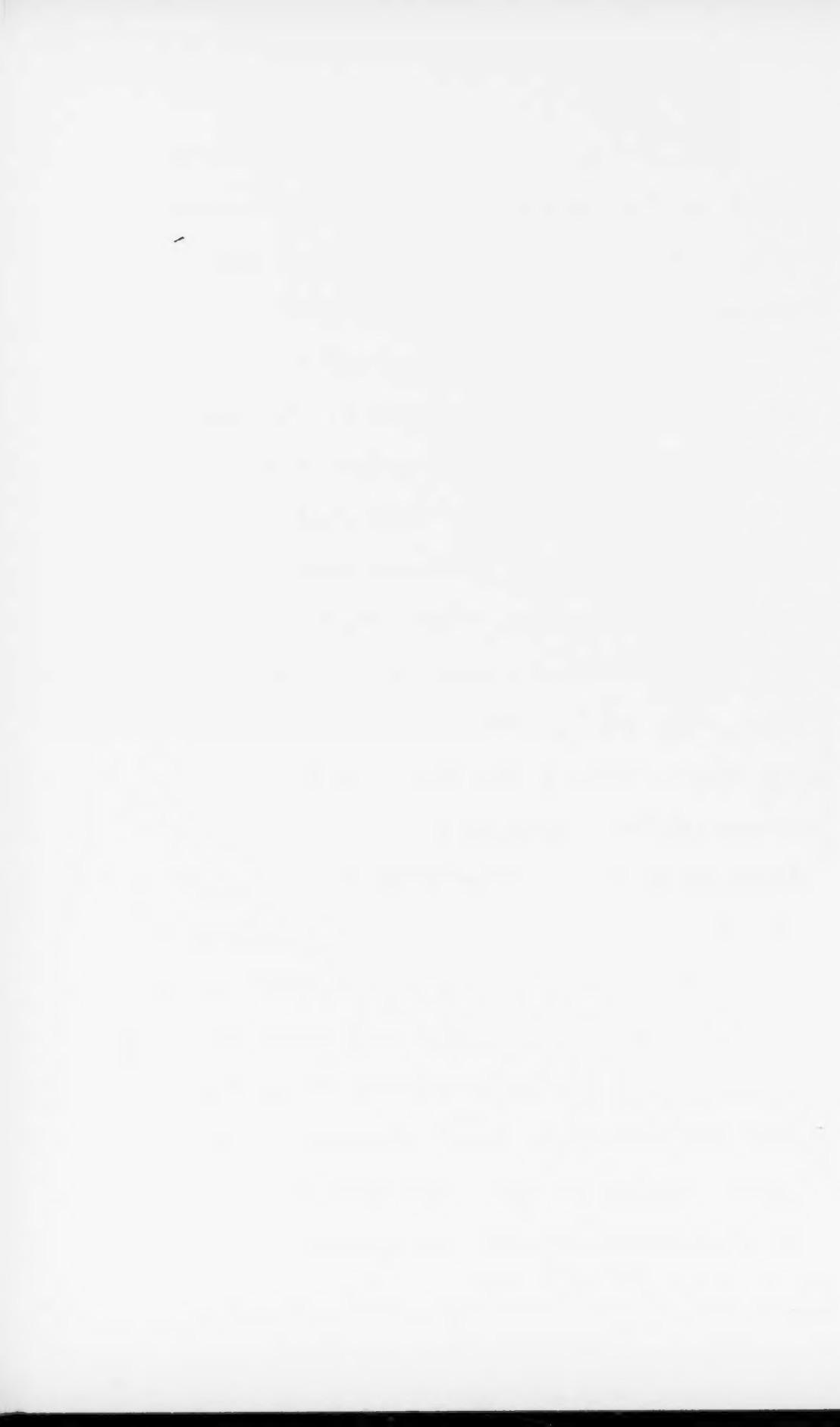
¹(...continued)

which is the subject of the instant petition, and petitioner's previous petitions, in this Court.



petitioner's remaining within one-hundred miles of Philadelphia and performing community legal services for one year. The sentence was stayed pending appeal.

Consistent with Pennsylvania practice, petitioner directly appealed to the Superior Court, which, as Pennsylvania's intermediate appellate court, has initial jurisdiction of all criminal appeals, 42 Pa. Cons. Stat. Ann. §742, except in cases involving the death penalty. 42 Pa. Cons. Stat. Ann. §722. Two judges of the Superior Court, over a vigorous dissent, purported to discharge petitioner on sufficiency grounds. Commonwealth v. Syre, 322 Pa. Super. 416 (1983). In discharging petitioner, the Superior Court panel majority grossly deviated from well-settled standards of appellate review which mandate that the reviewing court evaluate sufficiency claims in the light most favorable to respondent, as verdict winner, and that



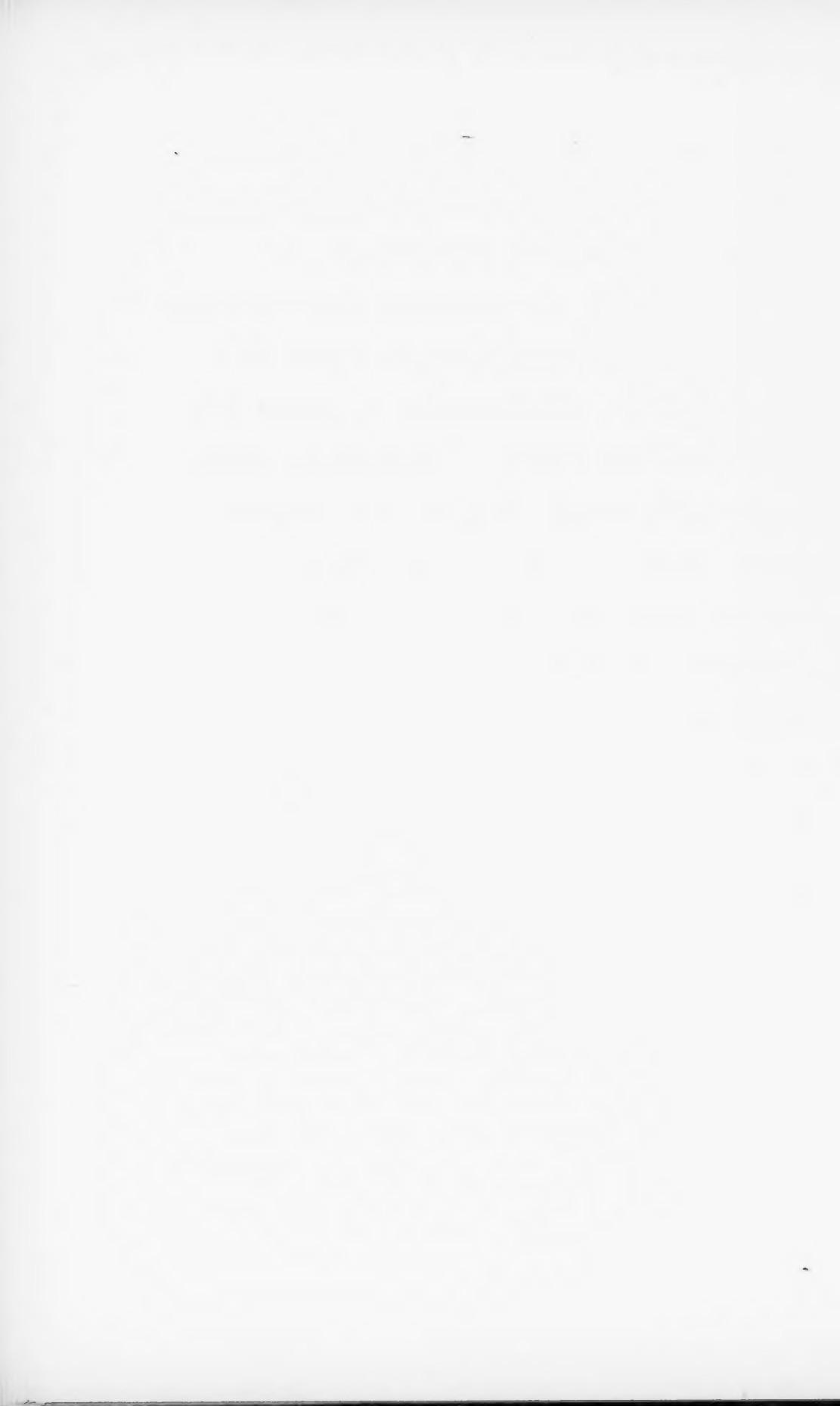
the court not substitute its own credibility findings for those of the fact finder. See, e.g., Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 469 (1942); Commonwealth v. Coccioletti, 493 Pa. 103, 107 (1981); Commonwealth v. Council, 491 Pa. 434, 437 (1980). Because the Superior Court blatantly violated these fundamental precepts and disregarded the clear import of the trial evidence, respondent, as is its right under Pennsylvania law, see 42 Pa. Cons. Stat. Ann. §724, petitioned the Pennsylvania Supreme Court for an allowance of appeal from the erroneous Superior Court decision and discharge order. The Pennsylvania Supreme Court not only allowed respondent's appeal, it reversed the Superior Court, found the evidence legally sufficient to sustain the jury's guilty verdict, and unambiguously reinstated petitioner's judgment of sentence. The case was then remanded to the Superior



Court for disposition of petitioner's remaining appellate claims. Commonwealth v. Syre, 507 Pa. 299 (1985).

On remand, the Superior Court granted a new trial based on alleged error by a court officer, Commonwealth v. Syre, 348 Pa. Super. 110 (1985). Respondent thereafter again sought Pennsylvania Supreme Court review.² Again, the Pennsylvania Supreme Court reversed the decision of the intermediate appellate court and reinstated petitioner's judgment of sentence. This Court denied petitioner's request for certiorari. Commonwealth v. Syre, 513 Pa. 1

²While petitioner's case was pending in the Pennsylvania appellate courts, he filed a civil suit against various current and former prosecutors, and court officers, in which he alleged, inter alia, that they were guilty of civil rights violations under 42 U.S.C. §1983. Petitioner's complaint was dismissed by the district court; the Court of Appeals affirmed; and this Court denied certiorari. Syre v. Pennsylvania, 662 F. Supp. 550 (E.D. Pa. 1987), affirmed, 845 F.2d 1015 (3rd Cir.), cert. denied, 488 U.S. 853, 109 S. Ct. 139 (1988).



(1986), cert. denied, 480 U.S. 935, 107 S.Ct. 1577 (1987).

On June 4, 1987, the trial court reimposed its original probationary sentence, set the amount of petitioner's community service at two hundred hours, and deleted the earlier requirement that petitioner was to remain in the Philadelphia area. The trial judge further ordered that petitioner's probation be transferred to Woodruff, Wisconsin, where petitioner then lived. Petitioner, however, refused to cooperate with the Wisconsin probation authorities or submit to their jurisdiction. Since petitioner declined to serve his probationary sentence in Wisconsin, and since he also failed to voluntarily appear before the Pennsylvania sentencing judge, respondent obtained a warrant and sought petitioner's extradition for violating probation. Petitioner was ultimately arrested and extradited from Wisconsin to

Pennsylvania. Petitioner's extradition was upheld by the Wisconsin courts, and this Court denied petitioner's request for certiorari review of the extradition order.

State ex rel. Syre v. Williquette, Sheriff of Vilas County, 441 N.W.2d 756 (Wisconsin Ct. of Appeals), review denied, 443 N.W.2d 312 (Wisconsin Supreme Ct.), cert. denied, 110 S. Ct. 157 (1989).

On August 23, 1989, petitioner, having exhausted his extradition appeals, appeared before the Pennsylvania trial judge for probation revocation proceedings. Petitioner's probation was revoked, and a new two year probationary sentence was imposed. As a condition of his probation, petitioner was again directed to perform two hundred hours of community service, and to cooperate with the Wisconsin probation authorities. Psychiatric probation was also recommended. Petitioner appealed to the Pennsylvania Superior Court, which this



time affirmed the judgment of sentence, rejecting petitioner's claim that the revocation proceedings were barred by double jeopardy. Petitioner's request for discretionary review by the Pennsylvania Supreme Court was denied. He then filed the instant petition for a writ of certiorari.

Petitioner here argues, as he did during the extradition proceedings, that his 1983 Pennsylvania Superior Court discharge, which was specifically reversed by the Pennsylvania Supreme Court on the prosecutor's appeal, nevertheless constitutes a binding and final acquittal of his previous conviction for jury tampering. Petitioner would thus unilaterally abort the appellate process at an inferior level of review and thereby deny respondent its right to seek an appeal by allowance to the state's highest court. Such a limitation on respondent's appellate rights is not constitutionally required, see United States



v. Wilson, 420 U.S. 332, 95 S. Ct. 1013 (1975), and is inconsistent with both Pennsylvania's appellate court hierarchy, see 42 Pa. Cons. Stat. Ann. §724, and specific Pennsylvania case authority, which recognizes the prosecutor's right to appeal in criminal cases.³ See Commonwealth v. Rawles, 501 Pa. 514 (1983); Commonwealth v. Blevins, 453 Pa. 481 (1973). Contrary to petitioner's assertion, such hierarchical review on a prosecutor's appeal to the state supreme court does not violate double jeopardy or otherwise infringe on any recognized constitutional right. For the

³By statute in Pennsylvania, final orders of the Pennsylvania Superior Court may be reviewed by the Pennsylvania Supreme Court upon allowance of appeal by any two justices, upon petition of any party to the matter. 42 Pa. Cons. Stat. Ann. §724. See also 42 Pa. Cons. Stat. Ann. §5105(b). As this Court noted in Arizona v. Manypenny, 451 U.S. 232, 249 n.27, 101 S. Ct. 1657, 1668-1669 n.27 (1981), in the majority of states, the prosecutor possesses at least some rights to appeal from an adverse judgment in a criminal case.



reasons which follow, petitioner's request for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

CONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE, A STATE PROSECUTOR HAS THE RIGHT TO FILE AN APPEAL AND OBTAIN A FINAL APPELLATE DISPOSITION IN A CRIMINAL CASE.

Petitioner, in a confused distortion of constitutional precedent and the specific procedural facts of this case, urges this Court's grant of a writ of certiorari to consider whether double jeopardy barred respondent from appealing the erroneous discharge order of Pennsylvania's intermediate appellate court. Petitioner, relying on this Court's decisions in Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745 (1986), and Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978), claims that the Superior Court order was tantamount to a verdict of acquittal and that it was



therefore final and unappealable. Neither Smalis nor Burks supports petitioner's argument.

In Burks v. United States, supra, this Court barred a retrial where the defendant's conviction was reversed on appeal for insufficient evidence. In Burks, however, the government did not challenge the judgment of insufficient evidence or deny that it had failed to meet its burden of proof. Hence, the issue of the prosecutor's right to appeal was not before the Burks Court and was not addressed in the Court's decision.

Moreover, insofar as Burks is relevant at all, subsequent cases generally assume that the prosecutor has a right to appeal a post-verdict judgment of insufficient evidence.⁴ As this Court said in Richardson

⁴See United States v. Greer, 850 F.2d 1447 (11th Cir. 1988); United States v. Covino, 837 F.2d 65, 67-68 (2nd Cir. 1988); United States v. Sharif, 817 F.2d 1375 (9th (continued...))



v. United States, 468 U.S. 317, 323, 104 S.Ct. 3081, 3085 (1984), and Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 309, 104 S.Ct. 1805, 1813 (1984), it is only an unreversed appellate ruling of insufficient evidence that bars retrial.

Where, as here, the judgment of insufficiency has been plainly and unambiguously reversed by a higher court, and the jury verdict reinstated, the double jeopardy clause is not implicated by the

⁴(...continued)

Cir. 1987); United States v. Kellerman, 729 F.2d 281, 283 n.3 (4th Cir. 1984); United States v. Singleton, 702 F.2d 1159, 1161-1162 (D.C. Cir. 1983); United States v. Dixon, 658 F.2d 181, 188 (3rd Cir. 1981); United States v. Blasco, 581 F.2d 681, 683 (7th Cir.), cert. denied, 439 U.S. 966 (1978); United States v. Jones, 580 F.2d 219, 221-222 n.3 (6th Cir. 1978); United States v. Calloway, 562 F.2d 615, 616-617 (10th Cir. 1977); United States v. Hemp-hill, 544 F.2d 341, 343 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977). See also Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970 (1981).



prosecutor's appeal.⁵ Thus, this Court has consistently recognized the right of the government to appeal in a criminal case where success on that appeal would result in reinstatement of the verdict, rather than further fact-finding relating to guilt or innocence.⁶

Petitioner's reliance on Smalis v. Pennsylvania, supra, is also misplaced. In Smalis, this Court held that a state prosecutor could not appeal the grant of a demurrer where the trial judge, at the close of the state's case, but before a verdict had been entered, ruled that the evidence was insufficient to sustain a conviction. The Smalis Court barred the

⁵See United States v. Martin Linen Supply Co., 430 U.S. 564, 570, 97 S. Ct. 1349, 1354 (1977) ("where a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended").

⁶See United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054 (1978); United States v. Morrison, 429 U.S. 1, 97 S. Ct. 24 (1976); United States v. Wilson, supra.



prosecutor's appeal because a reversal would have required post-acquittal fact-finding going to defendant's guilt or innocence. Here, however, respondent's success on appeal merely restored the jury's verdict. There was no additional fact-finding as to the elements of the offenses charged, and there was no double jeopardy. See United States v. Wilson, supra.⁷

Petitioner's further attempt to gain certiorari review by characterizing respondent's state supreme court appeal as "verdict nullification" is utterly belied by the procedural facts below. See Petition for Certiorari at 4. Despite his rumblings to the contrary, petitioner was

⁷The mere fact that further fact-finding is required does not constitute an automatic violation of double jeopardy principles. See United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187 (1978), where this Court approved a mid-trial appeal by the government when defendant had obtained a dismissal on grounds unrelated to guilt or innocence.



not acquitted; rather, he was convicted by a jury of his peers. Petitioner then appealed. Under Pennsylvania law, his appeal was first heard by the Pennsylvania Superior Court, which granted an erroneous discharge on sufficiency grounds. Respondent appealed that decision to the Pennsylvania Supreme Court, which reversed and reinstated the original jury verdict. Under well-settled constitutional standards, the Pennsylvania Supreme Court's reinstatement of the jury's verdict did not violate principles of double jeopardy. See United States v. Wilson, supra.

Nevertheless, petitioner, in an opportunistic argument that would accord fifth amendment finality to the erroneous decision of Pennsylvania's intermediate appellate court, inexplicably maintains that once a reviewing court enters a discharge on sufficiency grounds, that decision, no matter how erroneous or unprincipled, is

not subject to further appellate review. Fortunately, petitioner is wrong. Indeed, this Court has specifically refused to ascribe to a theory of constitutional finality that would interpret the reversed decision of an intermediate appellate court as an acquittal, or that would preclude the prosecutor from appealing by motion, rehearing, or certiorari from the adverse decision of an inferior appellate court. See United States v. Wilson, 420 U.S. at 345, 95 S. Ct. at 1022-1023; Forman v. United States, 361 U.S. 416, 426, 80 S. Ct. 481, 487 (1960). Petitioner, having invoked the jurisdiction of the Pennsylvania appellate courts by filing his direct appeal, had no right to benefit from Superior Court error, when, as here, that error could be corrected by respondent's appeal without subjecting petitioner to further fact-finding. See United States v. Wilson, 420 U.S. at 346, 95 S. Ct. at 1023 ("a



defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier-of-fact").⁸

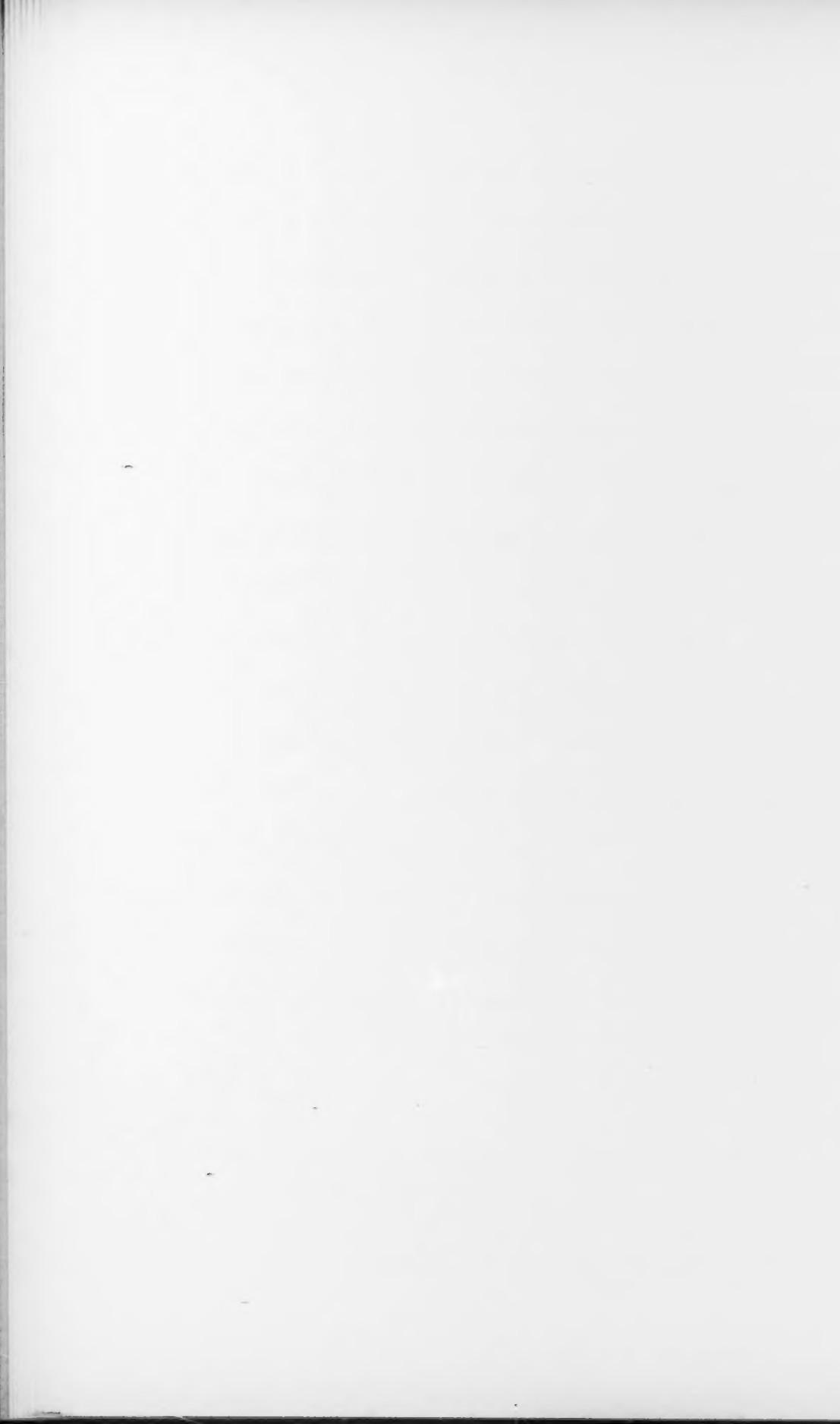
⁸In any event, since the initial appellate review in this case was undertaken by the Pennsylvania Superior Court at petitioner's request, he may not be heard to complain that his own appeal constituted a double jeopardy violation. See United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 1589 (1964); United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192 (1896). Moreover, once petitioner began the process of appeal, he could not prevent respondent from seeking a higher level of review in the Pennsylvania Supreme Court. See Price v. Georgia, 398 U.S. 323, 326, 90 S. Ct. 1757, 1759 (1970) (no double jeopardy until the initial prosecution has run its "full course").

Accordingly, petitioner's initial jeopardy did not terminate until after all levels of appellate review had been exhausted, and it is of no constitutional significance that it was respondent, rather than petitioner, who sought and obtained Pennsylvania Supreme Court scrutiny. See United States v. Steed, 674 F.2d 284, 286 (4th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982) (whether the assessment of the evidence is at behest of the defendant, or the government, the function of the reviewing court is unchanged and the same standard of review is appropriate).



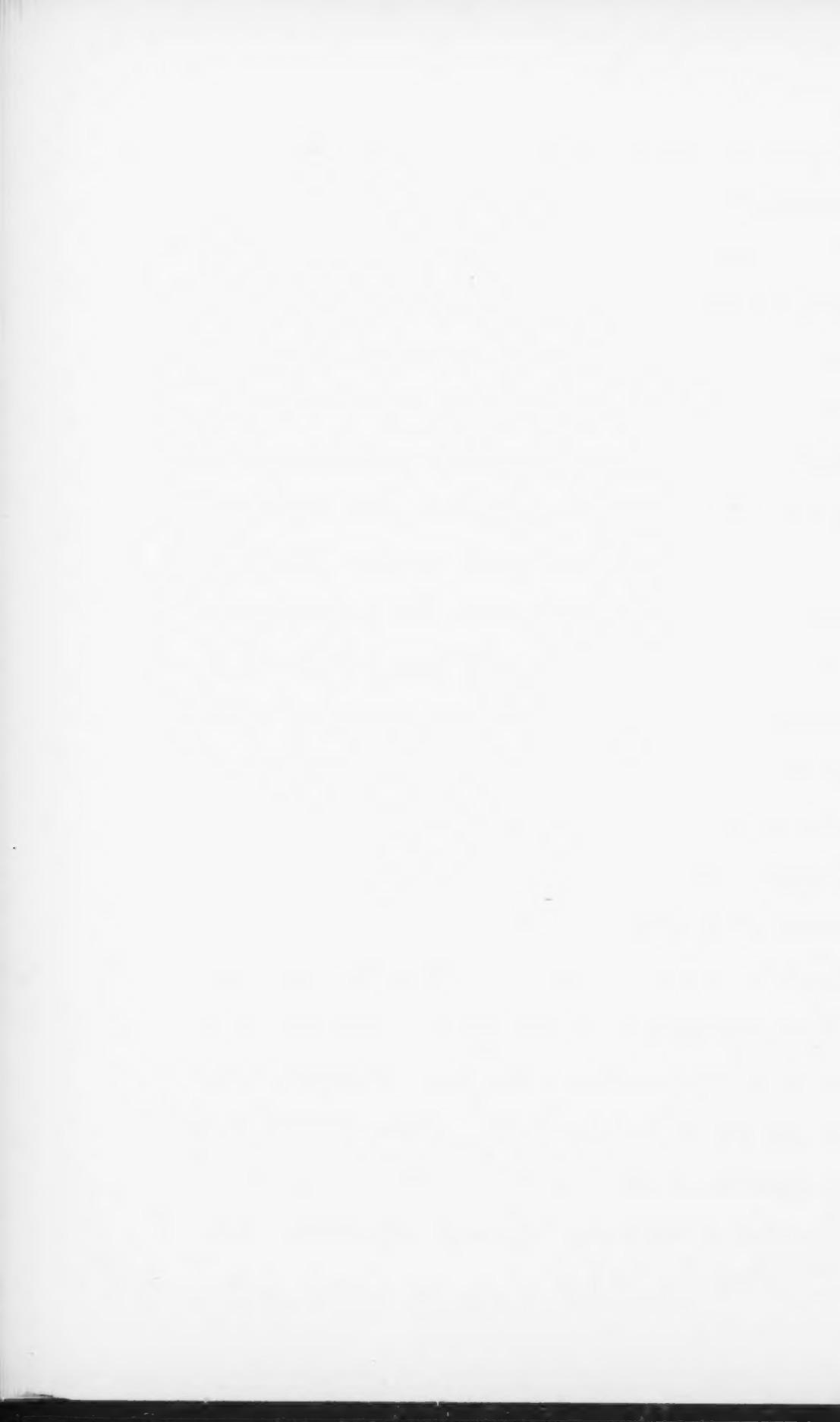
Finally, insofar as petitioner makes a comprehensible complaint concerning alleged "fact/law confusion in legal rulings," Petition for Certiorari at 8, he apparently takes the position that appellate review itself constitutes prohibited fact-finding under the double jeopardy clause. That is not the law. See United States v. Wilson, 420 U.S. at 342, 95 S. Ct. at 1021 (development of double jeopardy clause suggests that it was directed at multiple prosecutions, not Government appeals); United States v. Martin Linen Supply Co., 430 U.S. at 570, 97 S. Ct. at 1354 (same).⁹ Petitioner's attempt to confuse the well-defined functions of our trial and appellate courts, and thereby to impute a double

⁹ See also United States v. Greer, 850 F.2d at 1449-1450 n.5 (appellate court reviewing sufficiency claim does not engage in fact-finding under double jeopardy clause); United States v. Dixon, 658 F.2d at 188 n.12 (same).

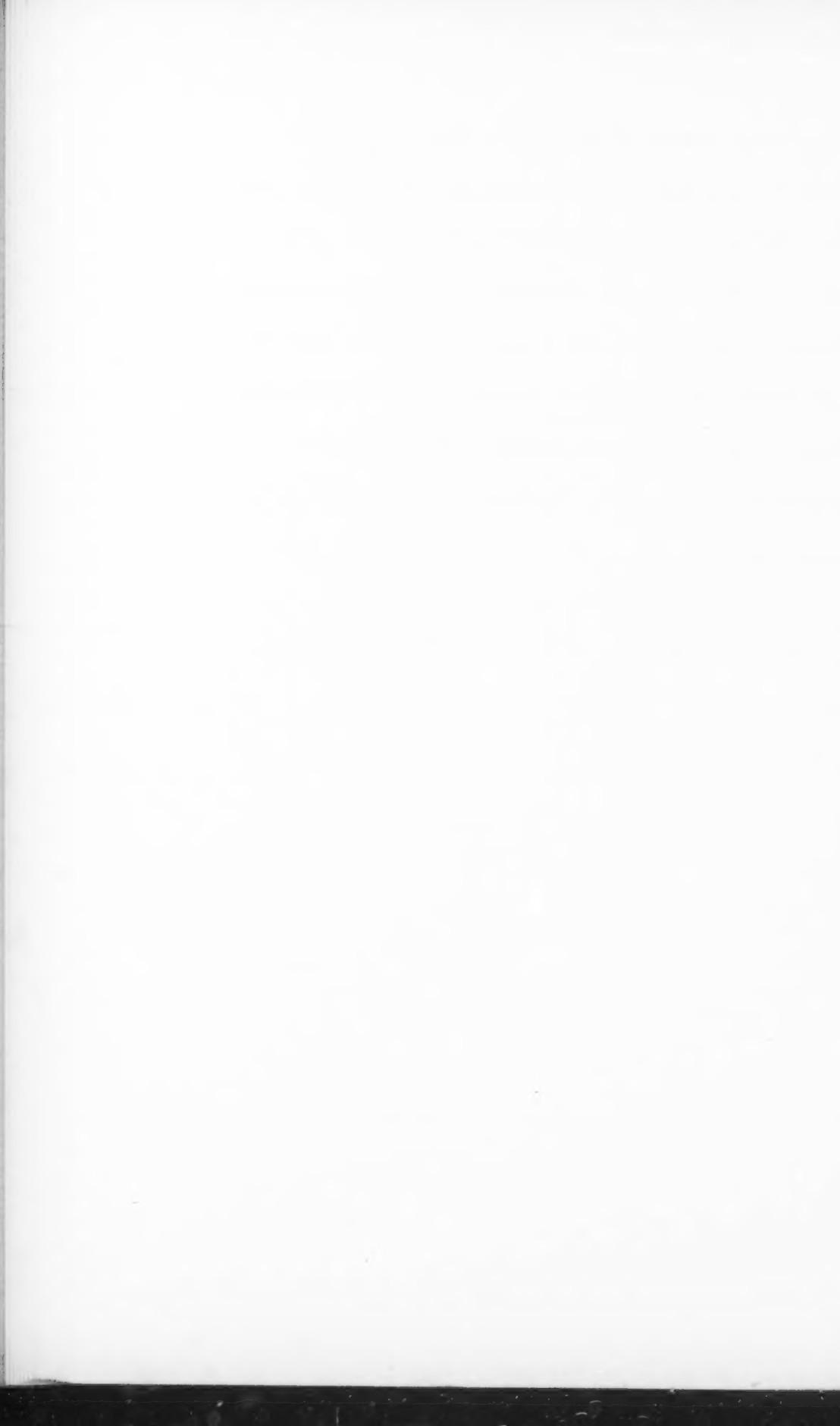


jeopardy violation where none exists, necessarily fails.

Pennsylvania trial and appellate courts perform distinct functions within a well-ordered judicial hierarchy. While the facts of a particular case are obviously important at each procedural stage, appellate courts do not replicate the fact-finding function of the trial court. Thus, an appellate court reviewing the sufficiency of the evidence does not hear witnesses, assess credibility, or make decisions concerning the weight of various items of evidence. See Glasser v. United States, supra. Rather, it is the function of the appellate court to evaluate whether the record facts, properly viewed in the light most favorable to the verdict winner, are adequate to support the fact finder's conclusions of criminality. This purely legal judgment is one which reviewing courts regularly perform "without intruding into



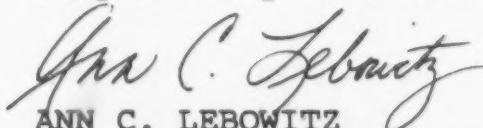
any legitimate domain of the trier-of-fact." Jackson v. Virginia, 443 U.S. 307, 321, 99 S. Ct. 2781, 2790 (1979). For petitioner to now suggest that this time-honored division of labor between our trial and appellate courts constitutes a violation of his rights under the double jeopardy clause is indeed a bogus constitutional claim.



CONCLUSION

For the foregoing reasons, respondent, the Commonwealth of Pennsylvania, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,



ANN C. LEBOWITZ
Assistant District Attorney
(Counsel of Record)
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Assistant District
Attorney
RONALD D. CASTILLE
District Attorney

1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700